Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

Award No. 24929
Docket No. 44587
98-1-96-1-C-4746

The First Division consisted of the regular members and in addition Referee Rodney E. Dennis when award was rendered.

PARTIES TO DISPUTE: (United Transportation Union
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Pursuant to the Order of Stay by Judge Harvey Bartle in the United States District Court for the Eastern District of Pennsylvania dated November 19, 1996 requiring a decision by the National Railroad Adjustment Board ('NRAB') with respect to the reasons and justification for the June 8, 1995 strike at the Conway Yard and defendants' compliance with the Federal Railroad Safety Act under 49 U.S.C. Section 20109 and 45 U.S.C. Section 153. The Board finds as follows:"

FINDINGS:

The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Board met on January 27, 1998, to hear arguments from the parties as to whether the Board was required, in accordance with procedures set out in the Federal Railroad Safety Act, under which the Organization alleges this case should fall, to allow

testimony by witnesses from both parties when the Board sits to consider the case on its merits. Numerous comments were made on the subject by the representatives of both parties. After presentations were made to the Board and the Board members questioned the parties, a recess was called while the parties conferred with the partisan Board Members. When the Board reconvened, it was concluded by both parties that no witnesses would be called to testify when the Board met with the parties to review the case on its merits. A time and place for the hearing on the merits was agreed upon, and the Board met on March 17, 1998. Both parties were represented by counsel and were allowed an unlimited amount of time to make affirmative and rebuttal statements. The issue to be reviewed and decided upon by the Board is stated as follows:

THE ISSUE BEFORE THE BOARD

Did the refusal to work by certain of the carrier's (Conrail) employees on or about June 8, 1995, at the carrier's Conway, PA Yard, meet the conditions set forth in Section 10(b) of the Federal Railroad Safety Act ('FRSA'), 49 U.S.C. § 20109(b)?

PERTINENT STATUTORY LANGUAGE

Federal Railroad Safety Act ('FRSA'), 49 U.S.C. § 20109(b) and (c)

(b) Refusing to work because of hazardous conditions. (1) a railroad carrier engaged in interstate or foreign commerce may not discharge or in any way discriminate against an employee for refusing to work when confronted by a hazardous condition related to the performance of the employee's duties, if--

(A) the refusal is made in good faith and no reasonable alternative to the refusal is available to the employee;

(B) a reasonable individual in the circumstances then confronting the employee would conclude that

(i) the hazardous condition presents an imminent danger of death or serious injury; and
(ii) the urgency of the situation does not allow sufficient time to eliminate the danger through regular statutory means; and

(C) the employee, where possible, has notified the carrier of the hazardous condition and the intention not to perform further work unless the condition is corrected immediately.

(2) This subsection does not apply to security personnel employed by a carrier to protect individuals and property transported by railroad.

(c) Dispute resolution. A dispute, grievance, or claim arising under this section is subject to resolution under section 3 of the Railway Labor Act (45 U.S.C. 153). In a proceeding by the National Railroad Adjustment Board, a division or delegate of the Board, or another board of adjustment established under section 3 to resolve the dispute, grievance, or claim, the proceeding shall be expedited and the dispute, grievance, or claim shall be resolved not later than 180 days after it is filed. If the violation is a form of discrimination that does not involve discharge, suspension, or another action affecting pay, and no other remedy is available under this subsection, the Board, division, delegate, or other board of adjustment may award the employee reasonable damages, including punitive damages, of not more than $20,000.

On or about June 7, 1995, Trainman D.S. Holdren notified the Trainmaster at Conway Yard that he had bumped his knee on the stirrup of a car while dismounting. The Organization contends that the ballast and walkways had been undermined by rat infestation that contributed to Holden's injury. Terminal Superintendent Micklos was informed of the incident and after some discussion with numerous people, including D.S. Holdren, it appeared as if Holdren had agreed to enter a transitional work assignment

program. Mr. Holdren, however, did not appear for his scheduled work assignment on June 8, 1995. After a number of phone conversations with Mr. Holdren, Superintendent Micklos told him to report to work at the risk of being charged with insubordination if he failed to do so. Mr. Holdren phoned the Local Chairman's home about the incident. The Local Chairman and Vice General Chairman, Jack Arnold, were having dinner with some other Union officials at a local restaurant at the time. The Local Chairman's wife took the call from Holdren and called the restaurant to inform her husband of the situation. Additional calls were made back and forth between Holdren, the Local Chairman, and Jack Arnold.

In the final analysis, Jack Arnold told Holdren that he did not have to report to work under the transitional work assignment program. At this point, it was also concluded by Jack Arnold that "conditions at Conway Yard could no longer be tolerated." Mr. Arnold thereupon ordered the shutdown of the Hump Yard. On Arnold's direction, the Hump was shut down. Shortly thereafter, Mr. Hoover, the Conrail General Manager, arrived at the restaurant where Arnold and his party were located. They began to discuss the reasons for the strike and what could be done to resolve it. After discussing a list of safety issues presented by Mr. Arnold and a resolution of the Holdren issue, the strike was called off and pickets were told to go to work.

As a result of the strike and the discussion of unsafe conditions in Conway Yard, it was agreed that a joint Union-Management inspection of the yard would take place the next day. Local Chairman Souders accompanied Carrier officials on the inspection. No serious problems were discovered and no remedial action was required by Carrier as a result of the inspection.

Soon after the strike issue was resolved, Conrail brought an action in federal court in the Eastern District of Pennsylvania, alleging among other things that the June 8, 1995, strike was illegal and in violation of the Railway Labor Act since it was a work stoppage over a minor dispute. After claims and counter claims, the court concluded that the National Railroad Adjustment Board had jurisdiction in the case, since the Organization contended its actions were supported by the Federal Railroad Safety Act. This Board was convened to decide, based on the record before it, whether the actions taken by the Organization on June 8, 1995, were covered by the FRSA and if the required procedures of that Act were adhered to by the Organization.

After a detailed review of the extensive record presented by both parties in their February 15, 1997 Submissions, this Board has concluded as follows:

(1) The attempt by the Carrier to force Trainman Holdren to participate in the temporary work assignment program was the cause of the June 8, 1995, strike. Recorded telephone calls on the night of the incident, and the depositions of a number of employees supplied for the court proceedings persuades this Board that no other conclusion can be drawn but that the strike was called as a protest to Carrier's actions in the Holdren incident.

(2) Based on the record, it does not appear that there was any justification for the June 8, 1995, strike under the Railway Labor Act or the Federal Railroad Safety Act. The dispute that triggered the job action, the Holdren incident, cannot by any analysis be construed as a major dispute or an incident that forced any employee, including Holdren, to work under hazardous conditions that must be present before the FRSA comes into play.

There is no evidence in this record to support the contention of the UTU (Jack Arnold) that conditions in Conway Yard on June 8, 1995, were hazardous to the degree that they presented imminent danger of death or serious injury to employees in the yard. The strike was called because of the treatment received by Trainman Holdren from Superintendent Micklos. The defense presented by the UTU (Jack Arnold) that the strike was called because of serious safety conditions in Conway Yard that Carrier neglected to resolve is not grounded in fact and is not persuasive to this Board.

(3) The procedures of the Federal Railroad Safety Act, Section 10(b), were not followed by the UTU (Jack Arnold).

The pertinent language of the FRSA states that the Carrier cannot take action against an employee for refusing to work when confronted by hazardous conditions, related to the performance of the employee's duties if:

> the refusal was made in good faith and no reasonable alternative to the refusal was available. A reasonable person would conclude that conditions were so hazardous as to present a danger of death or serious injury to workers and that the situation was so urgent that sufficient time was not

available to remedy it through regular means. Finally, the law states that the employees, where possible, must notify the Carrier of the hazardous conditions and of their intention not to work unless conditions are corrected immediately.

The record of this case is lacking in any evidence to support the contention that hazardous conditions existed in Conway Yard on June 8, 1995, that presented a danger of death or serious injury to employees. There is no evidence to persuade this Board that if hazardous conditions did exist, that it was brought to the attention of the Carrier, with the understanding that if conditions were not remedied, a strike would result.

Applying the most liberal interpretation to all of the UTU (Jack Arnold) arguments presented in this case, this Board is compelled to conclude that the refusal to work by certain UTU employees on June 8, 1995, in Carrier's Conway, PA Yard did not meet the conditions set forth in Section 10(b) of the Federal Railroad Safety Act.

AWARD

The answer to the question put before the Board is no. The strike called by the UTU/Jack Arnold did not meet the conditions required by FRSA Section 10(b).

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the UTU (Jack Arnold) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division

Dated at Chicago, Illinois, this 6th day of July 1998.